

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

Reverend Franklin C. Reaves, Ph.D.,

Plaintiffs,

vs.

Sherry R. Rhodes, individually and in her official capacity as  
Clerk of Court for Marion County; Mark Richardson,  
individually and in his official capacity as Sheriff of Marion  
County; Levon Nichols, individually and in his official  
capacity as Deputy Sheriff of Marion County; Willie Dean  
White, individually; City of Mullins; Pam Lee, individually  
and in her official capacity as Mayor; Terry B. Strickland,  
individually and in his official capacity; Terry Davis,  
individually and in her official capacity; Wayne Collins,  
individually and in his official capacity; Jo A. Sanders,  
individually and in her official capacity; Patricia A. Phillips,  
individually and in her individual capacity; Carolyn Wilson,  
individually and in her official capacity; City of Mullins  
Police Department; Kenny Davis, individually and in his  
official capacity as Chief of Mullins Police Department;  
South Carolina Department of Social Services,

Defendants.

) C/A No.: 4:10-125-TLW-TER

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) REPORT AND RECOMMENDATION

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This action was removed to this Court on January 18, 2010. Defendants filed Answers (Documents # 6, 10) on January 19, 2010, and January 21, 2010. On January 25, 2010, Plaintiff filed a Notice of Voluntary Dismissal (Document # 13) in which he asserts dismissal is appropriate pursuant to Rule 41(a)(1)(A), Fed.R.Civ.P. and that a court order dismissing the case is unnecessary. Plaintiff filed an Amended Notice of Voluntary Dismissal (Document # 14) on January 26, 2010, again asserting that voluntary dismissal was appropriate pursuant to Rule 41(a)(1)(A). Plaintiff also asserts that he filed and served an Amended Complaint on January 4, 2010, and that Defendants had not filed an Answer to the Amended Complaint. Plaintiff attaches a copy of the Amended

Complaint, but does not present any proof of service of the Amended Complaint on Defendants. Further, the copy of the Amended Complaint filed with this Court is not date-stamped by the state court clerk.

Defendants, Sherry R. Rhodes, Mark Richardson, Levon Nichols and South Carolina Department of Social Services filed a Reply to Plaintiff's Notice and Amended Notice of Dismissal, in which they indicate their consent to dismissal of this action, but argue that dismissal should be had pursuant to Rule 41(a)(2), Fed.R.Civ.P. because Answers had been filed by all Defendants at the time Plaintiff filed his Notice of Dismissal. Plaintiff has not responded to the arguments raised in these Defendants' Reply.

Rule 41(a)(1)(A), Fed.R.Civ.P., provides that voluntary dismissal of an action is proper without a court order "by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment" or a stipulation of dismissal signed by all parties who have appeared. Rule 41(a)(2), Fed.R.Civ.P., provides that a court order is otherwise required for a voluntary dismissal. It appears that Plaintiff is arguing that dismissal without a court order is appropriate because Defendants had not filed Answers to the Amended Complaint at the time he filed his Notice of Dismissal. Even assuming the Amended Complaint was properly filed and served, the service of an amended complaint does not revive the right to voluntarily dismiss an action without court order when an answer to the original complaint has been filed. See Armstrong v. Frostie Co., 453 F.2d 914, 916 (4th Cir.1971); Wright v. Standard Ins. Co., No. 8:07-cv-1586-T-33MSS, 2008 WL 5070228, at \*6 (M.D.Fla. Nov.24, 2008); Tedeschi v. Barney, 95 F.R.D. 182, 183 (S.D.N.Y.1982). Thus, it is necessary to dismiss this case pursuant to Rule 41(a)(2), Fed.R.Civ.P.

Accordingly, it is recommended that this case be dismissed upon Plaintiff's request pursuant to Rule 41(a)(2), Fed.R.Civ.P.<sup>1</sup>

s/Thomas E. Rogers, III  
Thomas E. Rogers, III  
United States Magistrate Judge

May 25, 2010  
Florence, South Carolina

**The parties are directed to the important notice on the following page.**

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<sup>1</sup>On May 12, 2010, the undersigned entered an Order (Document # 39) directing Plaintiff to notify the court within ten days whether he wished to voluntarily dismiss the action or continue to prosecute it. The Order provided, "[i]f Plaintiff fails to comply with the Order, the undersigned will assume Plaintiff intends to voluntarily dismiss this case and a recommendation will be entered accordingly." No response has been filed by Plaintiff.